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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 204

WILLIAM HENRY HACKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 23–25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1962 (Pet. App. 23). The petition for a writ of certiorari was filed on June 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of petitioner's prior narcotic activities was properly received after the defense of

entrapment had been raised by petitioner on cross-examination of a government informer.

2. Whether petitioner was denied rights under 18 U.S.C. 3500 when handwritten notes of transactions witnessed by narcotic agents were destroyed by the agents after the notes had been embodied in reports which were turned over to petitioner at trial.

3. Whether petitioner's admissions to a narcotics agent were voluntary and properly corroborated.

4. Whether narcotics obtained from petitioner's automobile at the time of his arrest were lawfully seized.

STATEMENT.

A five count indictment returned in the District Court for the Eastern District of Michigan charged the petitioner with the unauthorized sale and distribution of narcotics in violation of 26 U.S.C. 4705(a) and with the receipt and concealment of narcotics, knowing they had been illegally imported into the United States, in violation of 21 U.S.C. 174 (R. 9a–11a).[1] Following a trial by jury, petitioner was found guilty as charged (R. 143a). On March 22, 1961, he was sentenced, as a second offender, to concurrent terms of imprisonment of fifteen years on each count (R. 144a–145a, 163a, 164a). The court of appeals affirmed per curiam (Pet. App. 23–25).

The pertinent facts may be summarized as follows:

[1] The record consists of two separately paginated appendices. Petitioner's appendix in the court of appeals is paginated from 1a through 175a; the government's appendix in the court of appeals is paginated from 1b through 93b. Appropriate page and letter references will be made to the two appendices.

1. THE EVIDENCE IN GENERAL

In March 1960, one Clifton Watson, a friend of the petitioner, was arrested in Detroit, Michigan, on a narcotics charge. Shortly thereafter, Watson agreed to work for the Detroit office of the Bureau of Narcotics as a special employee (R. 68a, 80a, 99a–101a, 121a, 26b–29b, 50b–51b).

On August 18 and September 19, 1960, narcotic agents searched Watson at his residence, gave him money, and concealed on his person a small radio transmitter (R. 51a–52a, 65a, 92a–93a, 95a, 97a). On each occasion, Watson telephoned the petitioner who subsequently entered Watson's home and handed him packages of heroin in exchange for money (R. 53a–54a, 65a–67a, 94a, 96a–97a, 11b). Narcotic agents observed the petitioner enter and leave Watson's residence on the dates in question (R. 69a–70a, 74a–76a, 78a, 84a, 86a, 88a–89a, see R. 53a, 56a, 62a–63a, 83a, 11b, 15b). On the first occasion, using a radio receiver, an agent stationed outside of the residence heard the petitioner remark to Watson that the "measure" (of heroin) was "nice", and that the petitioner had "other stops" to make that day (August 18) (R. 73a–74a). On September 19, 1960, the same agent, still using the receiver, heard the petitioner tell Watson that his "public" had been "bothering" him, and that he had "other packages to mix" (R. 77a–78a). Agents concealed inside the residence either saw the petitioner exchange packages of heroin for money, or overheard conversations between the petitioner and Watson (R. 53a, 65a–66a, 11b; see R. 16b).

In early October 1960, a narcotics agent was sent to the Wayne Metropolitan Airport in Detroit to arrest the petitioner. Accompanied by a Michigan state trooper, the agent arrested the petitioner near petitioner's parked automobile (R. 90a). Heroin was subsequently found inside a camera case which was located in the front seat area of the automobile (R. 50a, 90a–91a, 11b).

2. THE DEFENSE OF ENTRAPMENT

Watson testified on cross-examination that he and petitioner had been close friends and that he had lent petitioner money (R. 31b–36b), and that petitioner agreed to sell him narcotics the first time he asked (R. 36b). Watson also testified they talked about narcotics two or three months before the first sale was made (R. 37b). Watson denied he asked petitioner to help him out because Watson had lent petitioner money, but said he might have told petitioner he could help Watson make some money (R. 37b).

On redirect examination by the government, Watson testified that he had been in the cocaine business in 1958, and that the petitioner was present when he purchased cocaine (R. 105a–106a). Counsel for the petitioner objected to this line of questioning as irrelevant (R. 106a). He stated that the main defense would be entrapment, but argued that this defense raised an issue of law for the court to decide in the absence of the jury (R. 107a, 109a, 41b). The objection was overruled, the court holding that if all the evidence established entrapment the petitioner would be entitled to a judgment of acquittal from the court,

but that the government should not be denied the opportunity to rebut that defense on redirect examination of Watson (R. 110a, 40b–41b).

Watson then testified that he and the petitioner had purchased cocaine from 1958 to early 1960 from sources in Chicago, Cleveland and New York (R. 111a–114a; see R. 46b–49b, 54b–55b, 59b–60b). After his arrest, Watson discussed ways of getting cocaine with the petitioner over the telephone about ten or twelve times (R. 45b, 46b). On some occasions, Watson telephoned the petitioner from Bureau offices, and agents overheard the conversations (R. 116a).

The government also introduced into evidence a copy of a conviction of the petitioner in the United States District Court for the Eastern District of Michigan, which indicated that the petitioner had pleaded guilty in 1951 to a sale of narcotics (R. 123a, 125a).

During redirect examination of Watson, the court instructed the jury that they could not consider the evidence being offered as proof of the offenses charged in the indictment, but that, inasmuch as the petitioner claimed that he was induced to commit the offenses by reason of the activities of the Government's agents, it was allowing government counsel to question the witness "for the purpose of establishing * * * whether or not the defendant was predisposed to commit an offense" (R. 114a–115a; see R. 118a–119a). The judge submitted the issue of entrapment to the jury under full instructions (R. 135a–137a).

3. THE ADMISSIONS OF THE PETITIONER

At the trial, District Supervisor Ross Ellis of the Narcotics Bureau testified to admissions by petitioner. The circumstances were developed out of the presence of the jury. After his arrest, petitioner offered to co-operate with the Bureau. On October 13, 1960, in his office, Ellis interviewed the petitioner, who was out on bond (R. 172a, 60b–61b, 71b, 75b–76b).

Ellis asked the petitioner to review the facts of the case which he had mentioned to the agents at the time he had offered to cooperate, telling the petitioner that he was not required to make a statement (R. 172a, 71b). Petitioner said that he had purchased the narcotics seized at the time of his arrest from a Mr. Akins in New York City, with whom he had dealt since July 1960, and that he would assist the Bureau in building a case against Mr. Akins (R. 62b–64b, 72b–73b). The petitioner asked Ellis what he should do and what he could expect from the Bureau in return (R. 74b–75b). Ellis testified (R. 169a–170a, 65b–66b):

> I told him that he would have to cooperate successfully and obtain evidence, with the Government * * *; that if he did cooperate, that he would have to testify; further, that we could not in his case consent to any dismissal, that there would be no possibility of probation, that he would still be prosecuted in his case, and he would still serve a sentence; that if he were successful in making these cases, that the most that we could recommend would be for my Bureau, by me, to recommend to the United States attorney and to the court that Mr.

> Hackett * * * be permitted to plead guilty to the lesser offense, namely, the purchase, sale and so forth, not in an originally stamped package, which is a charge under the old law; that he was a second offender, and as a result of that the most minimum sentence would be 5 to 20 years. * * * And I told him then that: "Mr. Hackett, if I recommend 5 years, that doesn't mean recommending the minimum, under this reduced charge; that does not mean that the Judge or the United States Attorney is going to agree with me; * * * and if the Judge were to sentence you, say, for ten years, or more than the 5-year minimum, it would not be as a result of our not keeping our word."

Ellis also told the petitioner that, if he cooperated, the Bureau would recommend that Ellis not be incarcerated in the same prison with parties against whom Ellis had given evidence (R. 66b).

The court ruled that the testimony of Ellis was admissible (R. 174a–175a, 77b–78b). Ellis testified to substantially the same facts as developed outside the presence of the jury (see R. 79b–85b). In its instructions to the jury, the court charged, in part (R. 138a–139a):

> A voluntary admission is one made on the basis of free choice. It need not be volunteered in the sense of being made without request. However, to be voluntary, it must have been the result of a choice in a free mind and not the result of pressure, inducement or promise of reward by the interrogating official, which, of course, would make a truly free choice impossible.

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> * * * The slightest menace or threat, or any hope engendered or encouraged, that the defendant's case will be lightened or more favorably dealt with if he will confess, is enough to exclude the confession thereby superinduced; and any words spoken in the hearing of the prisoner which may in their nature engender such fear or hope, renders necessary that a confession made within a reasonable time afterwards shall be excluded, unless it is shown by clear and full proof that the confession was voluntarily made after all trace of hope or fear had been fully withdrawn or explained away.

4. THE "JENCKS ACT" ISSUES

At the trial, narcotic agents testified that they took notes of their observations of transactions involving the petitioner, that they used their notes in the preparation of reports and memoranda in the case, and that they destroyed their notes after the reports had been prepared (R. 12b–13b, 16b–17b, 19b–20b, 23b). The reports of the agents who testified were either turned over to counsel for the petitioner or given to the court for *in camera* inspection (R. 78a–79a, 80a–81a, 102a–104a, 12b, 16b, 19b, 20b, 23b, 27b, 33b). The court ordered the production of some reports or parts of reports to the defense, and sealed other reports or parts of reports it found did not fall within 18 U.S.C. 3500(e) (R. 78a–79a, 80a–81a, 86a–88a, 102a–104a, 27b, 33b).

Statements made by Watson to narcotic agents on August 18 and September 19, 1960, were turned over to the petitioner at the conclusion of Watson's

direct examination (R. 27b). During cross-examination, Watson testified that he "imagine[d]" that the narcotic agents took notes of an interview with him when he discussed the purchases of narcotics in Chicago, Cleveland and New York (R. 166a, 52b). When asked to name the agents who took the notes, he replied that Agent Vernier was one (R. 166a, 52b). At that point, counsel for the petitioner requested the production of "any notes that were made by any agent relative to what [Watson] told them concerning these particular acts" (R. 166a–167a, 53b). When the court stated that it could rule upon the production only after the testimony showed what was involved, counsel for the petitioner asked for and was given permission to "go further into it" (R. 167a–168a, 53b–54b). Watson testified that he had never seen any such notes, nor had any such notes been read to him (R. 54b). Counsel for the petitioner then questioned Watson on other matters.

At a later stage of the trial, the court brought up the subject of the petitioner's request "for the report or statement taken from the witness Watson" (R. 170a–171a, 67b). Government counsel stated that he had inquired into the matter and was not aware of any statements of any nature, other than the two that had been produced which would be subject to production under the Jencks Act (R. 171a, 67b–68b).

At a later point, the following colloquy transpired (R. 175a, 78b–79b):

> The COURT: Now, I forgot to take up the matter of the report of the conversation between the witness Watson and the agents.

> What is the position of the Government?
>
> Mr. MOORE [Counsel for the Government]: Your Honor, after looking through the various files here, we find that there are no such notes in existence now, or reports made from such notes, so we don't know of anything that we can produce under the request made.
>
> The COURT: Does the Government have, so that I may get that exactly as it is, does the Government have in its possession any memoranda or other reports indicating any statements made by the witness Watson to any Government agent or any other person?
>
> Mr. MOORE: No, there are none that we know of.

At the conclusion of the Government's case, Agent Vernier was recalled for further cross-examination (R. 89b). Counsel for the petitioner questioned Vernier regarding conversations with Watson, but never asked Vernier whether he had made any notes of these conversations (R. 89b–90b). Petitioner made no further demand for notes, reports or statements.

ARGUMENT

1. Petitioner contends (Pet. 8–12) that the trial court erroneously allowed the government to introduce evidence of his prior narcotic activities to rebut the defense of entrapment, which he claims at that point in the trial had not yet been affirmatively raised.

The record shows, however, that the government did not seek to introduce evidence of the petitioner's prior narcotic activities through redirect examination of Watson until *after* the petitioner, on cross-examination of Watson, raised the defense of

entrapment. Before this testimony was introduced, the petitioner told the court that his "main line of defense" was entrapment (R. 107a, 109a, 41b). It was therefore permissible for the government to seek to rebut this defense through proof that the petitioner was predisposed to commit the instant offenses. *Sherman* v. *United States*, 356 U.S. 369, 375–377; *Sorrells* v. *United States*, 287 U.S. 435, 451.

In the circumstances, the government's rebuttal evidence properly came in on re-direct examination of Watson. Indeed, if the testimony as to predisposition had not been given at that point the matter would have been foreclosed, since petitioner offered no defense testimony.

The contention (Pet. 12–13) that the defense of entrapment should be decided by the court and not by the jury was rejected in *Sherman* v. *United States*, 356 U.S. 369. Petitioner presents no new considerations.

2. Petitioner's contention (Pet. 13–14) that the destruction by the narcotic agents of their notes constituted a "flagrant * * * frustration of the intent and purpose" of 18 U.S.C. 3500 is without merit. The notes in the instant case were not "statements" within 18 U.S.C. 3500(e) (1) or (2). They were merely the personal memory aids of the agents, not shown to anyone, and used by the agents to prepare official reports on the case. The reports, which embodied the events the agents had observed on the dates in question, were turned over to the petitioner.

There was thus no reason for the agents to retain their notes.

There is no foundation for the petitioner's contention (Pet. 14–15) that the trial judge abdicated his responsibility in favor of the prosecutor by informing the petitioner that unless he could prove to the court that notes of an interview with Watson qualified as statements under the Jencks Act, he would not order the Government to produce them. As shown by the Statement, *supra,* Watson testified that he "imagine[d]" that notes were taken by narcotic agents during an interview and that Agent Vernier was one of the agents who took those notes. Watson later testified that he did not see the notes in question, and that no one read any notes to him. Government counsel subsequently informed the court that, after checking the files of the case, he was unable to find any notes of the agents or statements of Watson, other than the two which had already been turned over to the petitioner. On recross-examination of Agent Vernier, petitioner questioned the agent about conversations with Watson, but did not ask the agent if he had taken any interview notes. There was therefore no reason for the judge to order notes produced or to pursue the matter further.

The case is thus materially different from *Campbell* v. *United States,* 365 U.S. 85, where the witness testified that he thought he had read over and signed the agents' notes, and that the report prepared by the agent on the basis of the notes was not an accurate account of what he had said. This Court held that under such circumstances it was error to

place upon the defendant the burden of calling the agents to show why the notes had been destroyed. Here there was no proof that Agent Vernier took notes during an interview with Watson, and no showing that Watson adopted any notes.

3. Ellis testified that the petitioner told him, *inter alia*, that he had purchased the narcotics found at the time of his arrest (the basis for count 5) from a source in New York. See the Statement, *supra*. Petitioner contends (Pet. 17) that something more than "the unsupported testimony of an interested party" should have been "required" to establish the making of such oral confession. The short answer is that there is no requirement in the federal courts calling for corroboration of the *making* of an oral, extra-judicial confession. *Cash* v. *United States*, 265 F. 2d 346, 347 (C.A.D.C.). The only requirement is that there be some evidence to corroborate recitals in an extra-judicial confession, although the corroborative evidence need not be sufficient to establish the *corpus delicti*. *Opper* v. *United States*, 348 U.S. 84; *Masse* v. *United States*, 210 F. 2d 418, 420 (C.A. 5), certiorari denied, 347 U.S. 962; *Ryan* v. *United States*, 99 F. 2d 864, 870 (C.A. 8), certiorari denied, 306 U.S. 635; cf. *Smith* v. *United States*, 348 U.S. 147, 152–154. In the instant case, the narcotics found in the automobile furnished independent evidence of the *corpus delicti*.[2]

[2] Petitioner asserts (Pet. 17) that, prior to trial, he moved for discovery of all the statements made by the Defendant under Rule 16 and Rule 6(a) of the Federal Rules of Criminal Procedure, and the United States Attorney at that time informed the court that no such statements were made. These recitals are misleading. Petitioner moved for production and

The confession was not involuntary (see Pet. 18). It was made to Ellis *before* the petitioner asked what he could expect from the Bureau of Narcotics for his proposed co-operation (R. 74b–75b). The case, therefore, is materially different from *Crawford* v. *United States*, 219 F. 2d 207 (C.A. 5), on which the petitioner relies, where promises and inducements were made by narcotic agents to the defendant *before* he admitted involvement in the narcotics traffic and named his supplier.

The practice of receiving evidence on the issue of voluntariness outside the presence of the jury in order to rule upon admissibility in the first instance, followed by the submission of the issue of voluntariness to the jury, is familiar practice. *Wilson* v. *United States*, 162 U.S. 613, 623–624; *United States* v. *Carignan*, 342 U.S. 36, 38; *Wagner* v. *United States*, 110 F. 2d 595, 596 (C.A. 5), certiorari denied, 310 U.S. 643; *Smith* v. *United States*, 268 F. 2d 416, 420–421 (C.A. 9); *Wright* v. *United States*, 250 F. 2d 4, 13 (C.A.D.C.).

4. Before trial, the petitioner moved to suppress the heroin found in his automobile at the time of his arrest. Since that issue goes only to count 5 of the indictment, which is not necessary to support the

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for permission to inspect and copy "all books, records, transcripts, documents, reports, memoranda, statements, notations, recordings, and including, but not limited to the foregoing, any and all written and recorded material whatsoever, obtained from or belonging to the Defendant, or obtained from others by seizure or by process * * * for purposes of trial" (R. 18a). The motion was denied except insofar as the court ordered the government to furnish information as to the time and places of the alleged violations (R. 34a–35a).

verdict, it is not really presented by this case. In any event, the point is without merit.

At the hearing on the motion to suppress, petitioner did not testify or offer any evidence. The government's evidence showed that in September or early October, 1960, the petitioner told Watson that his supply of narcotics was running low and that he expected to go to New York to get an additional supply (R. 6b–9b). On October 4, 1960, Watson told Agent Vernier that petitioner had left for New York and that Watson had seen petitioner's automobile parked at the Wayne Airport (R. 36a, 6b, 9b). The fact that the automobile was there was confirmed by Michigan police (R. 37a). At about noon on October 6, 1960, the petitioner was observed near his automobile. Agent Notel and a state trooper walked up to the petitioner, identified themselves, and Notel placed the petitioner under arrest (R. 41a, 42a, 44a–45a, 10b). Petitioner said that he just got off an airplane and that a camera case, found by the officers on the front seat of his automobile, belonged to him (R. 11b). A brown paper bag, the contents of which on subsequent analysis proved to be heroin (see R. 50a), was found inside the camera case (R. 42a). The court denied the motion, holding that petitioner was lawfully arrested on probable cause to believe that he was committing a violation of the narcotic laws, and that the search and seizure in question were lawful incidents of that arrest (R. 46a, 47a).

[3] Agent Notel testified that something had been done to the petitioner's automobile to make it not function (R. 41a, 43a). The automobile had a flat tire, and its hood was raised (R. 41a, 10b).

The court's ruling accords with *Draper* v. *United States*, 358 U.S. 307. Under 26 U.S.C. 7607, the agents were authorized to arrest without a warrant on probable cause to believe that the petitioner had committed a felony relating to narcotics.

At the trial, Watson testified that he did not personally go to the airport and see petitioner's car and that he did not recall giving such information to Agent Vernier (R. 122a–123a). However, this does not negate probable cause to arrest petitioner. The agents already had information, which they had verified, of sales of narcotics by petitioner to Watson in August and September. They thus had reason to believe that a trip by petitioner might well be to obtain an additional supply of narcotics. They did not rely on Watson's testimony that the car was at the airport but verified that fact for themselves. The total information was sufficient to justify the arrest of petitioner without a warrant and the search incident thereto.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

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